Commercial Paper: Postal Money Orders Receive Negotiable Equality

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Although the *Colgate* court was aware of the undesirability of adopting existing stereotypes as standards to be used in the interpretation of Title VII's exception and the necessity of effecting the purpose of Title VII through the elimination of undesirable motives as a basis for establishing a practice which comes within the exception, the court has not effectively implemented these policies. Further consideration must be given to refine its application of these policies.

**Commercial Paper: Postal Money Orders**

*Receive Negotiable Equality*

Postal money order blanks were stolen from a post office station, validated with an all purpose stamp, forged with the initials of an issuing employee, and presented to defendant bank for payment. The orders were ordinary on their face, and the bank, in good faith, paid the thief and forwarded the orders to the Federal Reserve Bank for reimbursement. The government paid them as a matter of course. Upon discovery of the forgery, the government demanded return of the money paid, which the bank refused. On cross motions for summary judgment, the federal district court held that there was no duty of restitution if the bank paid value for orders ordinary on their face and received payment without reason to know of the forgery and lack of authorization. *United States v. First National Bank*, 263 F. Supp. 298 (D. Mass. 1967).

The general rule, originating in equity courts, is that a payor may obtain restitution of money paid another if the payor was deprived of the expected exchange because of his mistake of fact as to some essential element of the contract. An exception...
tion to this doctrine, known as the rule of Price v. Neal, is that when the holder of a negotiable instrument receives payment from the drawee on a forged signature of the drawer, he has no duty of restitution if he has paid value and received payment without reason to know of the forgery. The Uniform Commercial Code adopts this exception in section 3-418. Its purpose is to promote free marketability of negotiable commercial paper by according finality to payments made by the drawee where his drawer's signature is forged. Thus, the mercantile transaction is concluded with the surrender of the instrument and no action for recovery of payment based on mistake is allowed.

Prior to 1951, the Postmaster General was authorized by statute to establish a uniform money order system at all suitable post offices. The purpose of this system was to afford the public greater convenience and security in the transfer of money through the mails. In United States v. Stockgrowers' National Bank, the court held that money orders were essentially transfers of funds between post office stations, never injected into commercial channels and, therefore, not negotiable instruments. Thus, the government was allowed to recover payments for fraudulently issued money orders on the theory that the money was paid under mistake of fact. A second defense for the government was established in United States v. Northwestern National Bank & Trust Company. There the government was permitted to recover payments made on forged instruments on the ground that when the government issued money orders it was exercising a sovereign function rather than engaging in a commercial activity.

4. RESTATEMENT OF RESTITUTION § 30 (1937); UNIFORM COMMERCIAL CODE § 3-418 [hereinafter cited as U.C.C.].
5. See U.C.C. § 3-418, Comment 2.
7. 30 F. 812 (D. Colo. 1887). There are relatively few decisions considering postal money orders. This paucity probably results from the fact that money orders may not be issued for an amount in excess of $100 and hence, under most circumstances, it is economically prohibitive to bring or defend an action on them. It is only when a substantial number are involved (sixty-three in the instant case) that their legal status is questioned.
10. Id. at 489. The court rejected the applicability of Price v. Neal
In 1951 the uniform money order system was changed to permit money orders to be cashed in banks as well as post offices. This change, designed to increase the circulation of postal money orders, increased the similarity between money orders and negotiable instruments.

To be negotiable under the Uniform Commercial Code, an instrument must be an unconditional promise or order to pay a sum certain in money at a determinable time, and comply with the provisions governing negotiability and transferability. While the article governing negotiable instruments applies only to instruments within this definition, it does not preclude similar treatment of nonnegotiable instruments. Moreover, a limited application of the law merchant to instruments not squarely within the language of the U.C.C. is permissible.

1. 39 U.S.C. § 5101 (1964). 39 CFR § 171.3 (b) (1) (1967) provides that money orders may be cashed at any post office or bank, and presently, 99% of all such orders issued are collected through the Federal Reserve Banks.

2. U.C.C. § 3-104 codifies the criteria which must be met before an instrument may be negotiable within the terms of Article Three. The court in Quality Fin. Co. v. Hurley, 337 Mass. 150, 155, 148 N.E.2d 385, 389 (1958), referred to this section as combining provisions "comparable" to those of the Negotiable Instruments Law all within one section.

3. U.C.C. § 3-105. A postal money order is an unconditional order to pay within the tenor of this section, notwithstanding the limitations imposed by 39 U.S.C. § 5104 (1964). One construction of this section, United States v. Farrington, 172 F. Supp. 797 (D. Mass. 1959), held that if an instrument contains the phrase "subject to" the terms of another document, that such a reference would be fatal to negotiability regardless of the provisions of the other document.

4. U.C.C. §§ 3-103, 3-104, 3-105, 3-201.

5. U.C.C. §§ 3-105, 3-109.


7. U.C.C. § 3-201.

8. U.C.C. §§ 3-104. Comment 2, provides that a result similar to negotiability may also be reached with respect to nonnegotiable paper, as through estoppel. See, e.g., Brown v. Scales, 109 Ga. App. 138, 135 S.E.2d 525 (1964).

9. U.C.C. §§ 3-104, 3-105. While postal money orders are not negotiable instruments under the Code, they must be treated as mercantile specialties rather than as simple contracts. See, e.g., United States v. Bank of New York, 219 F. 648 (2d Cir. 1914); President & Directors of Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594 (1926).
Money orders are distinguishable from negotiable instruments in that the former are statutorily limited to one endorsement, contrary to the provisions of the Uniform Commercial Code, and are made payable “to” the payee rather than payable either “to order” or “to bearer.”

Yet, while money orders do not possess all the qualities of negotiable instruments, they do have many of the characteristics of, and circulate as freely as, negotiable instruments. Consequently, decisions subsequent to 1951 have tended to erode the earlier rationalizations which permitted the government to recover from holders of unauthorized money orders. In United States v. Citizens & Southern National Bank, the court rejected the rationale expressed in Northwestern and denied the government recovery because of its negligent supervision of its employees. It also noted that although money orders are technically nonnegotiable, they are widely used in commercial transactions and, therefore, the transferee should be given protection comparable to the endorsee of a negotiable instrument. The court in United States v. Cambridge Trust Company continued
the erosion of the prior position of nonnegotiability by holding that money orders were neither negotiable nor nonnegotiable, but *sui generis* to commercial paper.

The court in the instant case rejected the defendant's contention that the post-1951 postal money orders were negotiable instruments under the Uniform Commercial Code and that section 3-418 prohibited recovery by the government. Yet it indicated that money orders were so similar to negotiable instruments that nearly all of the policy considerations behind section 3-418 and the rule of *Price v. Neal* were applicable. First, the court noted that bona fide purchasers of money orders, just as holders in due course of negotiable instruments, should be assured that their purchase of the instrument will pass ownership to them. It felt that denial of this protection to money


26. 97 Eng. Rep. 871 (K.B. 1762). This rule has been incorporated into U.C.C. § 3-418. Unique to negotiable instruments, it is designed to make payments on an instrument final in favor of a holder in due course, contrary to the normal legal obligation to repay money received through mistake of fact in the simple contract situation. Prior to its codification in the Negotiable Instruments Law, § 62, the rule was already a fundamental principle in the law of negotiable instruments. *See*, e.g., Bank of United States v. Bank of Georgia, 23 U.S. (10 Wheat.) 333 (1825); First Nat'l Bank v. First Nat'l Bank, 151 Mass. 280, 24 N.E. 44 (1890).

There have been four general theories supporting the proposition that the drawee cannot recover money paid another on a check or other instrument bearing a forged maker's signature: the drawee was negligent in failing to detect the forgery; the drawee is estopped to deny what he has already admitted by paying the item, *i.e.*, the genuineness of his drawer's signature; the consideration of finality of commercial transactions; and there is no superior equity in the drawee which would require shifting the loss. The theory that public policy demands finality of payment in commercial transactions is given the most credence, Dedham Nat'l Bank v. Everett Nat'l Bank, 177 Mass. 392, 59 N.E. 62 (1901), and this is the position adopted by the Uniform Commercial Code. However, Professor Ames argues that there is a lack of superior equity in the claimant who is seeking recovery and that as between two persons of equal equities, there would be no compelling reason to redistribute the loss in any other manner than has already occurred. Ames, *The Doctrine of Price v. Neal*, 4 Harv. L. Rev. 297 (1891). *See* Keener, *On Quasi-Contracts* (1893); Woodward, *The Law of Quasi-Contract* § 86 (1913); Aigler, *The Doctrine of Price v. Neal*, 24 Mich. L. Rev. 809 (1926); Note, *Current Status of Price v. Neal in New York*, 13 Syracuse L. Rev. 426 (1962).

orders would reduce the market for them and create a reluctance within the banking community to accept them. This would contravene the government's purpose for issuing the orders by detracting from the convenience and security of the public in transferring money through the mails.28

Furthermore, the court pointed out that the position of the post office would in no way be prejudiced by the denial of this claim, for it is in a superior position to protect itself against the payment of fraudulent money orders. The Post Office Department could arrange with the Federal Reserve Banks to make only provisional credit to the accounts of the collecting banks until final payment had been authorized through the Audit Division of the Post Office Department, thus eliminating the situation found in the instant case. Hence, the court held that the bank, in receiving payment for the money order, which appeared regular on its face but which in part bore forged authorization, did not become obligated to give restitution to the government if it paid value and received payment without reason to know of the forgery and lack of authorization.

This rule seems desirable, for the government is in the best position to defend itself from payment by mistake. Arguably it is not an "innocent party" if it has failed to take reasonable precautions to avoid such payment. Yet, even if the government is considered an innocent party here, the rule is justified by the desirability of the widest possible distribution of the risk of loss when one of two equally innocent parties must suffer

L.Q. 357 (1967). This article is the definitive treatment of postal money orders. Professor O'Malley argues that money orders should be treated like negotiable instruments, since the sovereignty and non-negotiability bases on which they were originally distinguished are no longer applicable. In support of this argument, he shows that average annual sales of money orders during the five year period from 1961 to 1965 were 243,553,600, with a value of $4,771,907,270. For fiscal year 1966, the government received over $59 millions in revenues from sales of money orders. During the period 1961 to 1965, 99% of the total number of money orders issued, with 98% of the total value issued, were handled not by post offices, but by commercial banks, paid through the Federal Reserve System. Thus, it is readily apparent that money orders have been injected into the normal bank collection processes, and have become a part of the commercial paper currently in circulation.

28. Extending the finality of payment rule to postal money orders would also increase the transferability, since private parties, protected from forgery loss would be more willing to accept government instruments. See United States v. First Nat'l Bank, 131 F.2d 985 (10th Cir. 1942), cert. denied, 318 U.S. 774 (1943).
from the wrongful acts of a third. In this instance, the government is in a superior position to bear the risks because of its power to set rates.

Despite the desirability of its application of the commercial paper law to money orders, the court failed to specify the nature of the instrument created. The form of the postal money order does not clarify the matter. One possible construction is to consider the purchaser of a money order a remitter, with the post office issuing the order as both drawer and drawee. Under this analysis, money orders would be analogous to both government checks and bank cashier's checks. It is established that the government when issuing checks drawn on itself is both drawer and drawee, and that when such instruments are presented and accepted for payment, the government cannot recover the amount paid on the instrument under a theory of mistake. Such decisions have rested on the ground that the government is subject to all the laws of commercial transactions governing private citizens. The application of negotiable instrument law to government checks and the judicial recognition given the analogy between these instruments and government money orders support application of negotiable instrument law to government money orders.

Postal money orders may also be viewed as being similar to

32. See, e.g., United States v. National Exch. Bank, 270 U.S. 527 (1926); Cooke v. United States, 91 U.S. 389 (1875). Moreover, any defense which may be asserted against a private party may be raised against the government when the government is a plaintiff. See, e.g., United States v. Norwegian Barque "Thelka," 266 U.S. 328 (1924); see generally Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827 (1957).
33. United States v. Cambridge Trust Co., 300 F.2d 76 (1st Cir. 1962).
personal checks or bank money orders. A check\textsuperscript{34} is an order by
the drawer drawn on funds on deposit in a bank, directing pay-
ment to a person, his order, or the bearer. A postal money order
is an order drawn on funds deposited in the post office by the
purchaser directing a post office or bank to pay a person. The
purchaser may be seen as the drawer and the post office, the
drawee, calling on funds deposited with it. The distinction is
slight between an order drawn against a specific deposit, and an
order in a series of ongoing orders, drawn against a sustained
fund of money. The analogy between bank money orders and
personal checks has been adopted in recent decisions which have
held that the law of negotiable instruments is generally applica-
table to money orders.\textsuperscript{35} Given the qualities of postal money
orders, the analogy to checks and bank money orders is persua-
sive. The only distinctions which can be drawn between bank and
postal money orders are the nature of the parties from whom
the instruments are procured, the statutory restrictions on en-
dorsement of postal money orders, and the extent of the right to
stop payment.\textsuperscript{36} None of these distinctions is of paramount sig-
nificance, and it would be untenable to apply different rules
of law to each.

Under either a drawer-drawee or bank money order
analogy, the result obtained in the instant case is appropriate.
It is desirable both because it will shift the risk of loss from
the bona fide purchaser to the issuer of the instruments, who is
generally able to spread that risk by adjusting the instrument's

\textsuperscript{34} U.C.C. § 3-104(2) (b). A check is, strictly speaking, a negotiable
instrument, bill of exchange, drawn on a bank, and payable on demand.
1930). See also The Law of Bank Checks—General Principles, 78 BANK.

\textsuperscript{35} See Garden Check Cashing Serv., Inc. v. First Nat'l City
Bank, 38 Misc. 2d 623, 238 N.Y.S.2d 751 (Civ. Ct. N.Y. City 1963), rev'd,
137, 277 N.Y.S.2d 698, aff'd mem., 18 N.Y.2d 941, 223 N.E.2d 566, 277
N.Y.S.2d 141 (1966). See also Note, Personal Money Orders and Tellers
Checks: Mavericks Under the UCC, 67 COLUM. L. Rev. 524 (1967).

\textsuperscript{36} U.C.C. § 4-403. See, e.g., American Defense Soc'y, Inc. v. Sher-

A limited right to stop payment is, however, available to holders of
postal money orders as well. Postal Manual § 171.37 provides that if
an order was purchased because of false representations or fraud, or if
the payee is conducting a scheme for obtaining money fraudulently
through the mails, notification of the post office will permit a stop-
payment on the instrument. The Postmaster General, at his own dis-
cretion, authorized such a stop-payment in Enterprise Sav. Ass'n v.
Zumstein, 67 F. 1000 (6th Cir. 1895).